APPENDIX A

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION II

[Filed Sep. 20, 2005]

Case No. 100,536

IN THE MATTER OF THE GROSS PRODUCTION AND PETROLEUM EXCISE TAX PROTEST OF RUDOLPH BRUNER RUDOLF BRUNER,
Protestant/Appellant,

vs.

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION,
Respondent/Appellee.

APPEAL FROM ORDER OF
THE OKLAHOMA TAX COMMISSION

AFFIRMED

Ronald J. Saffa
Reece B. Morrel
Paul R. Hodgson
MORREL, WEST, SAFFA,
CRAIGE & HICKS, INC.,
Tulsa, Oklahoma — For Protestant/Appellant
Douglas B. Allen

GENERAL COUNSEL
Cara S. Nicklas
ASSISTANT GENERAL COUNSEL
OKLAHOMA TAX COMMISSION
Oklahoma City, Oklahoma — For Respondent/Appellee

OPINION BY RONALD J. STUBBLEFIELD, JUDGE (sitting by designation):

¶1 This is an appeal by Rudolf Bruner (Taxpayer), a full-blood Creek Indian, from order of the Oklahoma Tax Commission (OTC) finding his application for a tax refund barred in part by a statute of limitations. Upon this Court's order, the case was orally argued on May 23, 2005. Based on review of the record on appeal, argument made to the Court, and applicable law, we affirm the appealed order.

FACTS AND PROCEDURAL HISTORY

¶2 On October 31, 1997, Taxpayer filed an application with the OTC seeking refund of gross production and petroleum excise taxes paid for the years 1989 through 1994. The total tax liability was $115,744.02 plus interest. Taxpayer based his refund claim on the fact that the oil production was from restricted Indian land he had inherited from his father who had in turn inherited it from his father, Miller Bruner, a full-blood Creek Indian. Miller Bruner received the property as an allotment on September 25, 1903.

¶3 On February 4, 1998, the OTC notified Taxpayer of its decision to disallow the refund claim, relying on the federal Act of May 10, 1928, 45 Stat. 495, and 68 O.S. Supp 1994 §§ 1001 and 1101.

¶4 Taxpayer protested the denial and demanded a hearing. The evidence of record shows the following facts, which the parties do not dispute:

> On September 25, 1903, the NW/4 of the SW/4 of the property was allotted to Miller Bruner as his homestead and the E/2 of the W/4 and the SW/4 of the SW/4 of the property was allotted to him, as surplus.
>
> Miller Bruner was enrolled as a full-blood Creek Indian.

> Miller Bruner died May 15, 1903, seized of the above restricted property which descended to Dick (Richard) Bruner, a full-blood Creek Indian.
>
> Dick Bruner died on September 19, 1981, seized of the above restricted property which descended to Rudolph Bruner, Randolph Bruner and Richard Bruner, Jr., one-third (1/3) each.
>
> Rudolph Bruner, Randolph Bruner and Richard Bruner, Jr. are restricted full-blood Creek Indians. The lands remain today Indian lands that are restricted from alienation by Acts of Congress.

The case was heard by an Administrative Law Judge (ALJ), who first ruled on motion to dismiss filed by the OTC. The ALJ overruled the motion to dismiss, concluding that the OTC did have jurisdiction to hear the specific argument raised by Taxpayer, pursuant to 68 O.S.2001 § 207 and the Oklahoma Administrative Code. However, the ALJ concluded that, even if the lands involved were exempt from taxation, 68 O.S. Supp. 1994 § 1008[1] would apply to Taxpayer's refund claim and, in essence, provide a three-year limitation period.[2] Thus, the ALJ ruled that the portion of the refund claim relating to taxes paid prior to October 31, 1994, was barred. The ALJ allowed the remainder of Taxpayer's claim, for taxes paid after October 31, 1994, to proceed,

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[1] Section 1008 has a provision specific to the facts of this dispute, providing that, in cases of overpayment or erroneous payment of gross production tax "on account of the production being derived from restricted Indian lands . . . and therefore exempt from taxation, the Oklahoma Tax Commission is authorized to refund any such over-paid, duplicate or erroneously paid gross production taxes, where an application for such refund is made within three (3) years from the date of the payment thereof . . . ."

[2] Section 1008 applies to gross production taxes, while 68 O.S.1991 § 1106 makes Section 1008's provisions also applicable to excise taxes on oil.

although counsel for both sides indicated at oral argument that the matter was apparently on hold awaiting disposition of this appeal. After the ALJ denied Taxpayer's motion to reconsider, the OTC adopted the ALJ's Findings of Fact, Conclusions of Law and Recommendation as its order. Taxpayer appeals that decision.[3]

STANDARD OF REVIEW

¶5 "This Court will review the entire record made before an administrative agency acting in its adjudicative capacity to determine whether the findings and conclusions set forth in the agency order are supported by substantial evidence." *In re Excise Tax Protest of Arkla, Inc.*, 1996 OK CIV APP 5, ¶ 5, 919 P.2d 1151, 1154. "If the record contains substantial evidence in support of the facts on which the decision is based and the order is otherwise free of error, the order will be affirmed." *Id.* In this instance, where there is no dispute of the basic facts, the issue is whether the order of the OTC is free of legal error. A protesting taxpayer has the burden of proving that a tax assessment is erroneous. *Id.*

DISCUSSION OF ISSUES

¶6 Although the ruling which resulted in this appeal is based on a statute of limitations, the real question is whether the State of Oklahoma has authority to levy gross production tax and excise tax on oil and gas produced from restricted

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[3] Although part of Taxpayer's claim for refund is still pending before the OTC, 68 O.S.2001 § 225(A) provides: "Any taxpayer aggrieved by any order, ruling, or finding of the Oklahoma Tax Commission directly affecting the taxpayer or aggrieved by a final order of the Tax Commission issued pursuant to subsection (g) of Section 221 of this title may appeal therefrom directly to the Supreme Court of Oklahoma." This is a provision of the Uniform Tax Procedure Code, 68 O.S.2001 §§ 20 through 263, which applies to "all state taxes." 68 O.S.2001 § 201. Certainly Taxpayer has been aggrieved by the order of the OTC holding that Taxpayer's claim for taxes paid prior to October 31, 1994, was barred by the statute, and therefore we find it to be an appealable order.

Indian land. That is so because an action by a restricted Indian to recover an illegal or unconstitutional levy of taxes would not be subject to a statute of limitations. *Nash v. Wiseman*, 227 F. Supp. 552, 556 (W.D. Okla. 1963).

I. Legality of the Taxes

¶7 Taxpayer argues that the Act of May 10, 1928, is unconstitutional as applied to him because he had a vested right to the exemption from taxation applicable to Miller Bruner's allotment of 1903. He also argues that the collection of the illegal tax constitutes a breach of fiduciary duty which would not be subject to a statute of limitations.

¶8 The OTC asserts that the taxes are not illegal—that they are permissible under the Act of May 10, 1928, and imposed by Oklahoma Statutes 68 O.S. Supp. 1994 §§ 1001 and 1101.

¶9 The Act of May 10, 1928, in pertinent, part provides:

> That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

The State of Oklahoma imposed gross production tax on oil by Section 1001, and excise tax on oil by Section 1101. Clearly, the federal act provides authority for levy of these

two specific taxes against allotted Indian lands. The issue thus becomes whether the Act of May 10, 1928, constituted an illegal breach of previous agreements granting rights and interests to the people of the Creek Nation.

A. Rights under the Creek/United States Agreements

¶10 Taxpayer cites *Carpenter v. Shaw*, 280 U.S. 363, 50 S. Ct. 121 (1930), for the holding that the taxation exemptions conferred upon allottees by the Atoka agreement were "property rights within the protection of the 5th Amendment and not subject to repeal by later congressional legislation." The problem with the argument is that the agreements between the United States and the Muscogee (Creek) Nation do not provide for perpetual taxation exemptions, and, as we shall discuss, the Act of May 10, 1928, did not repeal the tax exemption.

¶11 A tax exemption based on Taxpayer's status as an Indian must come from agreements between the Tribe/Nation and the United States Government. *See Marlin v. Lewallen*, 276 U.S. 58, 63-64, 48 S. Ct. 248, 250 (1928). In regard to the Creek Nation, there were two agreements with the United States—the Original Creek Agreement of March 1, 1901, 31 Stat. 861, and a Supplemental Agreement of June 30, 1902, 32 Stat. 500. From review of those agreements it is apparent they were comprehensive and intended to supplant preceding piecemeal legislation. *Bruner v. United States*, 340 F. Supp. 2d 1204, 1219 (N.D. Okla. 2004) (citing *Marlin*, 276 U.S. at 63, 48 S. Ct. at 250). The Original Creek Agreement of 1901 sets forth the specific terms under which Miller Bruner took title to the property. Section 7 of the Original Agreement provides that forty acres of every allotment shall be non-taxable *and inalienable for twenty-one years*. Similarly, Section 16 of the Supplemental Creek Agreement of 1902 required each citizen to select from his allotment forty acres *which would be nontaxable for twenty-one years from the date of the deed*. In addition, it is not disputed that the Home

stead Deed provides that the forty acres would be nontaxable and inalienable for twenty-one years. However, Taxpayer does not point to any language in the Agreements, the Homestead Deed, or the Allotment Deed making the land nontaxable *so long as it is restricted.*

¶12 It is true that various acts of Congress extended the restriction on alienation of the property beyond the twenty-one years provided in the Original and Supplemental Creek Agreements. For example, the Act of Congress dated August 11, 1955, 69 Stat. 666, extended the restrictions on alienation for the owner's life. *Bruner*, 340 F. Supp. 2d at 1219-20. But once again, Taxpayer does not point to any act that extended the tax exemption on lands restricted from alienation to the heirs of Richard Bruner, Sr.

¶13 It is important to note that Congress did not subject the minerals produced on the land here at issue to state and federal taxation until April 26, 1931, *by passage of the Act of Congress dated May 10, 1928.* Miller Bruner's deeds are dated October 22, 1903; twenty-one years from 1903 is 1924. Consequently, the twenty-one-year tax exemption provided under the Original and Supplemental Creek Agreements expired well before Congress enacted the Act of May 10, 1928. *Id.* at 1220. The Act did not repeal the exemption.

¶14 From our review we do not find that the agreements relating to allotment, between the United States and the Muscogee (Creek) Nation, granted a perpetual exemption from property taxation.

B. Tax Exemption vs. Restriction on Alienation

¶15 Taxpayer argues that the continuing restriction on alienation of the property requires that the tax exemption continue. The United States Supreme Court has stated that the restriction and exemption "go hand in hand." *Superintendent of Five Civilized Tribes v. Comm'r of Internal Revenue*, 295 U.S. 418, 420, 55 S. Ct. 820, 821 (1935). However, the high

court in *Superintendent* actually concluded that the suggestion that exemption must be inferred from acts creating restrictions on alienation was not well founded, and that "exemption could not be implied merely because of the restrictions upon the Indian's power to alienate." *Id.* at 421, 55 S. Ct. at 822. Restrictions upon alienation and non-taxability are distinct concepts, *Jones v. Taunah*, 186 F.2d 445, 44((10th Cir. 1951), and as such Congress could maintain one without the other. Indeed, that is exactly what was legislated by the Agreements that provide for alienation restrictions and tax exemption for twenty-one years, the Act of May 10, 1928 that recognized an end to the tax exemption, and later acts o Congress that extended the restrictions on alienation. As one commentator has stated: "The theory upon which restricte lands are held nontaxable does not apply after [May 10 1928]." W.F. Semple, *Oklahoma Indian Land Titles Annotated*, § 486 (1952). Therefore, we reject Taxpayer's attemp to link tax exemption with restriction on alienation.

II. Application of 68 O.S. 2001 § 2373

¶16 Taxpayer's final argument is that the OTC erred b not applying 68 O.S.2001 § 2373 to his refund request Section 2373 in pertinent part provides:

> *If upon any revision or adjustment, including over payment or illegal payment on account of income de rived from tax-exempt Indian land, any refund is foun to be due any taxpayer, it shall be paid out of th "Income Tax Withholding Refund Account", created b Section 2385.16 of this title, in the same manner a refunds are paid pursuant to such section.*
>
> The information filed, reflecting the revision or ad justment, shall constitute the claim for refund.
>
> Except as provided in subsection H of Section 2375 o this title, the amount of the refund shall not exceed th portion of the tax paid during the three (3) years immedi

ately preceding the filing of the claim, or, if no claim was filed, then during the three (3) years immediately preceding the allowance of the refund. *However, this three-year limitation shall not apply to the amount of refunds payable upon claims filed by members of federally recognized Indian tribes or the United States on behalf of its Indian wards or former Indian wards, to recover taxes illegally collected from tax-exempt lands. In the case of any refund to a member of a federally recognized Indian tribe or to the United States on behalf of its Indian wards or former Indian wards, to recover taxes illegally collected on bonus payments from oil and gas leases located on tax-exempt Indian lands pursuant to this section, the Tax Commission shall pay interest on all refunds issued after January 1, 1996, at the rate of six percent (6%) per annum from the date of payment by the taxpayer to the date of the refund.*

(Emphasis added.) Taxpayer claims this statute should be applied to his claim for refund.

¶17 The OTC responds by pointing out that the statute is found in Article 23 of the Revenue and Taxation statutes, which is the *Income Tax Code* of this state. Indeed, the language of the first paragraph of the law indicates that it applies to situations involving revision or adjustment of "income" tax. It is the rule that "[t]he plain meaning of statutory language is conclusive except in the rare case in which literal construction will produce a result demonstrably at odds with the intention of the Legislature." *Bishop v. Takata Corp.*, 2000 OK 71, n.30, 12 P.3d 459, 466. We must presume that the Legislature, when it enacted Section 2373, was aware of its other taxation laws, including Sections 1001 and 1101. It would have been simple enough for the Legislature to delineate the scope of Section 2373 to include gross production and excise taxes, but it did not do so. Because the basic rule of statutory construction is to discover the intent of the Legisla-

ture and, if possible, construe statutes to render them consistent, *Lucas v. State ex rel. Oklahoma Department of Human Services*, 2000 OK CIV APP 79, ¶ 5, 9 P.3d 89, 91, we must conclude that the differences between Sections 1001 and 1101 and Section 2373 reflect the Oklahoma Legislature's intent to treat claims for refunds for income tax different than those for gross production and petroleum excise taxes. Therefore, we find that Section 2373 does not apply to Taxpayer's claim.

CONCLUSION

¶18 We do not find Taxpayer's contentions of error availing of reversal. The tax exemption granted by the original agreements between the Creek Nation and the United States provided only for tax exemption for a twenty-one year period which had expired by the time Congress passed the Act of May 10, 1928. A continuation of restrictions on alienation of land did not continue the taxation exemption. Finally, the provisions of 68 O.S.2001 § 2373 do not apply to this action for refund of gross production and oil excise taxes. Accordingly, the judgment of the Oklahoma Tax Commission is affirmed.

¶19 AFFIRMED.

REIF, P.J., and WISEMAN, J., concur.

September 20, 2005

APPENDIX B

IN THE SUPRIME COURT OF THE
STATE OF OKLAHOMA

[Filed FEB 21 2006]

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

100,435	Diebold, Inc., et al. v. Earl Parker, et al. Petition for certiorari is denied. ALL JUSTICES CONCUR
100,536	in the Matter of Gross Production and Petroleum Excise Tax Protest of Rudolph Bruner; Rudolph Bruner v. State of Oklahoma Petition for certiorari is denied. ALL JUSTICES CONCUR
100,564	Bertha Holland, individually and as Personal Representative of the Estate of Pat Lee Phillips, deceased v. Urban Contractors, Inc. Petition for certiorari is denied. ALL JUSTICES CONCUR
100,883	Alvin J. Philipose and Joy A. Philipose v. Gary L. Morrissey and Kathy A. Morrissey Petition for certiorari is denied. CONCUR: Winchester, V.C.J., Lavender, Hargrave, Kauger, Edmondson, Colbert, JJ. DISSENT: Watt, C.J., Opala, Taylor, JJ.
101,430	CBT Steel Buildings Erectors, et al. v. Marlenea Elaine Steffens Qualls, et al. Petition for certiorari is denied. CONCUR: Watt, C.J., Winchester, V.C.J., Lavender, Hargrave, Opala, Kauger, Edmondson, Colbert, JJ. DISSENT: Taylor, J.

101,565 June C. May, M.D., v. Mid-Century Insurance Company, a member of the Farmers Insurance Group of Companies, et al. Petition for certiorari is denied. CONCUR: Lavender, Hargrave, Opala, Edmondson, Colbert, JJ. DISSENT: Watt, C.J., Winchester, V.C.J., Taylor, J. NOT PARTICIPATING: Kauger, J.

102,072 Ricki Royce Hollis v. State of Oklahoma, ex rel., Department of Public Safety Petition for certiorari is denied. ALL JUSTICES CONCUR

102,951 The Evans Company, et al. v. The Honorable Ellen Edwards, Judge of the Workers' Compensation Court Application to assume original jurisdiction is denied. ALL JUSTICES CONCUR

102,954 State Farm Fire & Casualty Company v. The Honorable Richard Van Dyck, Judge of the District Court of Grady County, 6th Judicial District Application to assume original jurisdiction is denied. ALL JUSTICES CONCUR

/s/ Joseph M. Watt
CHIEF JUSTICE

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed December 21, 2005]

No. 04-5141
(N. D. Oklahoma)
(D.C. No. 02-CV-504-H(C))

RICHARD BRUNER, JR. and BETTY K. BRUNER,
Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER AND JUDGMENT *

Before HENRTY, MCWILLIAMS, and MURPHY, *Circuit Judges*.

Richard Bruner, Jr., and Betty K. Bruner appeal the district court's decision affirming the denial of their claims for refunds of federal income taxes. We conclude that the district court lacked subject matter jurisdiction over the Bruners' refund claims for 1984, 1985, and 1991-1993. For those years, the Bruners failed to file timely refund claims with the IRS. For the tax years 1994 and 1995, we affirm the district court's decision for substantially the same reasons set forth in its August 16, 2004 order.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10TH CIR. R. 36.3.

I. BACKGROUND

The disputed tax payments arise out of a March 1983 oil and gas lease entered into by Richard Bruner, Jr., and his two brothers with Melzer Exploration Company. The lease covered the southwest quarter of Section 21-8N-9E, of Hughes County, Oklahoma. Pursuant to the lease, Richard Bruner, Jr., received income from the production of oil and gas. Richard Bruner, Jr., and his wife Betty K. Bruner included these oil and gas revenues in their taxable income for the tax years here in dispute: 1983, 1984, and 1991-95.

The land that the Bruner brothers leased to Melzer Exploration Company had been allotted to their grandfather, Miller Bruner, a full blood Creek Indian, in 1903. The homestead deed to Miller Bruner stated that the grant was "subject, however, to the conditions provided by said Act of Congress [of March 1, 1901], and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever, for twenty-one years." Aplt's App. at 20-21. After Miller Bruner's death, Richard Bruner, Sr., inherited the property. Richard Bruner, Sr. died in September 1981. Richard Bruner, Jr., and his two brothers then each inherited a one-third share in the property.

In 1998, the Bruners filed claims for refunds for the taxes paid on their oil and gas income for the disputed years. In denying the Bruners' claim for a refund, the Internal Revenue Service concluded that, as to the Bruners' homestead, Congressional legislation had created a tax exemption for twenty-one years. By 1928, when Congress passed a statute authorizing federal and state taxation of income from oil and gas production on restricted allotted lands of members of the Five Civilized Tribes, see 45 Stat. 495, § 3 (May 10, 1928), the tax exemption had expired Thus, the IRS concluded, "Mr. Bruner is subject to Section 3 of the 1928 Act making the royalties from production received from his restricted Indian land includible in income." Aplts' App. at 93.

The Bruners then challenged the IRS's decision in the United States District Court for the Northern District of Oklahoma, arguing that their oil and gas revenue was exempt from the federal income tax. As a result, the Bruners alleged, the payment of the tax violated their due process and equal protection rights. In response, the IRS argued that the court lacked jurisdiction over the Bruners' refund claims for 1984, 1985, and 1991-93 because the Bruners had failed to file their refund claims within the required period. The IRS also argued that the Bruners' oil and gas income was taxable.

In an August 17, 2004 decision, the district court rejected the Bruners' arguments for a tax exemption. The court concluded that (a) the early 20th century legislation under which Miller Bruner had received the original allotment had only created a tax exemption on the homestead for twenty-one years; (b) in 1928, after that period expired, Congress authorized the taxation of oil and gas income earned by members of the Five Civilized Tribes; and (c) the Bruners' equal protection rights were not violated by the fact that Congress exempted from taxation certain kinds of income derived from Indian lands while taxing the oil and gas income at issue here. The court did not address the IRS's contention that the Bruners' refund claims for 1984, 1985, and 1991-93 were time-barred.

II. DISCUSSION

The Bruners now contend that the district court erred in rejecting their constitutional challenge to the taxation of their oil and gas revenue. In particular, they argue that the Congressional legislation authorizing taxation income derived from oil and gas proceedings effected an unconstitutional taking of their property in violation of their Fifth Amendment rights.[1] In response, the IRS again contends that the Bruners'

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[1] In this appeal, the Bruners have not pursued their equal protection challenge. *See* Aplts' Br. at 35.

challenges to all but the 1994 and 1995 tax years are time-barred. The IRS also urges this court to affirm the district court's ruling on the merits of the Bruners' constitutional challenge.

Because the filing of "a timely tax refund claim with the IRS is a jurisdictional prerequisite to maintaining a tax refund suit," *Angle v. United States*, 996 F.2d 252, 253 (10th Cir. 1993), we begin with that issue. *See Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002) ("[J]urisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998))). Then, as to the remaining tax years, we proceed to the merits of the Bruners' challenge. The district court's rulings involve questions of law, and we therefore engage in de novo review. *See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 576 (10th Cir. 2000) (reviewing de novo "the district court's construction of federal and state law"); *Angle*, 996 F.2d at 253 (holding that subject matter jurisdiction is considered de novo).

A. Tax Years 1984, 1985 and 1991-93

Under 26 U.S.C. § 6511(a), a refund claim for an overpayment of tax must be made within the latter of three years from the time the return is filed or two years from the time the tax is paid. *See Richards v. Comm'r*, 37 F.3d 587, 589 (10th Cir. 1994). "No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. § 6511(b)(1). Moreover, § 7422 of the Internal Revenue Code provides that the failure to comply with these time limits constitutes a jurisdictional defect that bars a lawsuit in federal district court to obtain a refund. *See Sorrentino v. IRS*, 383 F.3d 1187, 1188 (10th Cir. 2004) (stating that "[§] 6511 of the [Internal

Revenue Code] limits the Government's waiver of immunity under § 7422(a) by requiring a taxpayer to file a claim for refund or credit with the IRS within a specified period of time" and that "the taxpayer's timely filing of such claim with the IRS is a jurisdictional prerequisite to maintaining a tax refund suit against the Government").

Here, there is no dispute that, as to the tax years 1984, 1985, and 1991-93, the Bruners did not file their claims for refunds within the required time-period. In particular, the Bruners filed their refund claims on April 14, 1998. By that time more than three years had elapsed from the filing of their 1984, 1985, and 1991-93 returns, and more than two years had elapsed from their latest tax payments for those years. *See* Aple's Br. at 7 (summarizing the dates on which the Bruners filed returns and paid taxes). Nevertheless, the Bruners argue that the limitations period should be equitably tolled. They cite several cases in which courts have indicated that statutes of limitations may not apply to claims asserted by Indians holding restricted land. Apits' Reply Br. at 2-3; *Dodge v. United States*, 362 F.2d 810, 812 (Ct. Cl. 1966) (discussing "[t]he equitable exception to the statutory limitation periods for noncompetent Indians with trust income"); *Daney v. United States*, 247 F.Supp. 533, 535 (D. Kan. 1965) (stating that "general rules of tax law, like general acts of Congress, do not apply to restricted Indians in such a strict manner" and that "[a judge in the Western District of Oklahoma] has recently ruled that a refund claim can be filed by a restricted Indian at any time").

We are not persuaded by the Bruners' argument. First, in a case decided after those on which the Bruners rely, the Supreme Court has concluded that "Congress did not intend the 'equitable tolling' doctrine to apply to § 6511's time limitations." *United States v. Brockamp*, 519 U.S. 347, 354 (1997).

Moreover, as the IRS observes, the equitable tolling decisions invoked by the Bruners involved government officials who filed a tax return on behalf of an Indian. Thus, the principle at work is that the Indian taxpayer should not have been precluded from seeking a refund if he or she had relied on a government official to handle tax matters.

Those decisions are inapplicable here. As the IRS indicates, the Bruners did not rely on a government official to pay their tax returns. The Bruners signed their own returns, and they were reviewed and submitted by professional preparers.

Accordingly, we conclude that the district court lacked jurisdiction over the Bruners' claims for refunds for the years 1984, 1985, and 1991-1993.

B. Tax Years 1994 and 1995

As to the tax years 1994 and 1995, we conclude for substantially the same reasons set forth in the district court's August 16, 2004 order that the taxation of the Bruners' income from the oil and gas lease did not violate their Fifth Amendment due process rights.

As the district court explained, the original Creek Agreement of 1901, 31 Stat. 861, and the Supplemental Creek Agreement of 1902, 32 Stat. 500, provided that forty acres of every allotment would be nontaxable for a period of twenty-one years. In 1928, Congress passed a statute providing that:

> *all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma*, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, *shall be subject to all State and Federal taxes of every kind and character the same as*

those Produced from lands owned by other citizens of the State of Oklahoma;

45 Stat. at 496 (emphasis added). By 1928, the exemption period for the Bruners' land had ended. Thus, the 1928 statute constituted a valid exercise of Congress's powers under the Indian Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956) ("We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens.").

The cases on which the Bruners primarily rely are distinguishable. They involve statutes that imposed taxes within a period that had been deemed tax-exempt by prior legislation.

Thus, in *Choate v. Trapp*, 224 U.S. 665 (1912), the Supreme Court considered the claims of Choctaw and Chickasaw Indians who had received allotted land under the Atoka Agreement, which provided that "[a]ll the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent." 30 Stat 507 (June 28, 1898). Despite the provisions of the Atoka agreement, Congress, in 1908, had passed a statute removing restrictions on the sale and encumbrance of land and also providing that the lands from which restrictions had been removed would be subject to taxation. The state of Oklahoma had then attempted to impose property taxes.

The Supreme Court held that the land could not be taxed. The Court reasoned that the state had created a contractual right in a tax exemption for a certain number of years. Thus, "[u]nder the provisions of the 5th Amendment, there was no more power to deprive [the Indian allottee] of the exemption than of any other right in the property." *Choate*, 224 U.S. at 674. In *English v. Richardson*, 224 U.S. 680 (1912), the Court applied this reasoning to the attempted imposition of state

taxes upon a Creek Indian. Citing *Choate*, the Court held that the attempted imposition of a state tax was invalid.

Unlike the 1928 statute at issue here, the statutes challenged in *Choate* and *English* fell within the original period of the tax exemption established when the federal government first conveyed the allotted land. Here, the tax exemption period ended in 1924, twenty-one years after Mr. Bruner's grandfather, Miller Bruner, received a deed to the homestead. Congress's imposition of a federal income tax after that period did not constitute an unlawful taking under the Fifth Amendment.

Finally, we note the Bruners' observation that Congress has continued to impose restrictions upon alienation of the allotted land at issue. According to the Bruners, Congress's extension of the restrictions upon alienation indicates that the tax exemptions set forth in the Original Creek Agreement have been continued as well. However, as the district court correctly explained, "land restrictions and tax exemptions are discrete entities." Aplt's App. at 484 (District Court Order filed August 16, 2004, at 23); *see Okla. Tax Comm'n v. United States*, 319 U.S. 598, 607 (1943) ("Nontaxability and restriction upon alienation are distinct things, and when Congress wants to require both non-alienability and nontaxability it can, as it has so often done, say so explicitly.") (internal quotation marks and citation omitted). Thus, in light of Congress's clear authorization in the 1928 statute of federal income taxes on oil and gas revenues, the restrictions upon alienation invoked by the Bruners do not create an exemption from taxation.

III. CONCLUSION

Accordingly, as to the tax years 1984, 1985 and 1991-93, we conclude that the district court lacked subject matter jurisdiction over the Bruners' refund claims. Therefore, as to the Bruners' refund claims for those tax years, we VACATE

the district court's decision and remand with instructions to dismiss for lack of subject matter jurisdiction.

As to the tax years 1994 and 1995, we conclude that the Bruners' oil and gas revenue was properly subject to federal income taxation. Therefore, as to Bruners' refund claims for those years, we AFFIRM the district court's decision.

Entered for the Court,

Robert H. Henry
Circuit Judge

APPENDIX D

1. The Act of May 10, 1928, 45 Stat. 495 provided in § 3:

   "That all minerals, including oil and gas, produced or or after April 26, 1931, from restricted allotted lands o members of the Five Civilized Tribes in Oklahoma, o from inherited restricted lands of full-blood Indiar heirs or devisees of such lands, shall be subject to al State and Federal taxes of every kind and character th same as those produced from lands owned by othe citizens of the State of Oklahoma; and the Secretary o the Interior is hereby authorized and directed to caus to be paid, from the individual Indian funds held unde his supervision and control and belonging to the Indiar owners of the lands, the tax or taxes so assessed agains the royalty interest of the respective Indian owners i such oil, gas, and other mineral production."

2. Section 11 of the Curtis Act (Act of June 28, 1898, 3(Stat. 495: "Provided, that the lands allotted shall b nontransferable until after full title is acquired and shal be liable for no obligations contracted prior thereto b the allottee, and shall be nontaxable while so held."

3. Fifth Amendment to the Constitution of the Unite States: "No person shall * * * be deprived of life liberty or property, without due process of law; no shall private property be taken for public use, withou just compensation."

4. Treaties and Statutes extending the restrictions agains alienation:

   Section 6 of the Original Creek Treaty provided that:

   "Allotments Under Curtis Act Confirmed.—6. Al allotments made to Creek citizens by said commis sion prior to ratification of this agreement * * * ar confirmed * * *."

Section 7 of the Original Creek Treaty (31 Stat. 861, approved March 1, 1901, and ratified by the Creek Nation May 25, 1901) provided:

> "Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted for or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of Interior.
>
> Each citizen shall select from his allotment 40 acres as homestead, which shall be non-taxable and inalienable and free from any incumbrances whatever for 21 years, for which he shall have a separate deed, conditioned as above. * * *" (Emphasis supplied)

Section 16 of the Supplemental Creek Treaty (32 Stat. 500, approved by Congress June 30, 1902, and ratified by the Creek Nation July 26, 1902, effective by Proclamation of the President August 8, 1902) provided, in part:

> "Lands allotted to citizens shall not in any manner or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of 5 years from the date of approval of this supplemental agreement, except with the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land * * *, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance for twenty-one years from the date of the deed therefor, and a separate deed shall be

issued to each allottee for his homestead, in which this condition shall appear." (Emphasis supplied)

Section 19 of the Act of April 26, 1906 (34 Stat. 137), extended the restrictions to April 26, 1931, providing in § 19, in part:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of 25 years from and after the passage and approval of this Act, unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress * * *. * * * Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

The Act of May 10, 1928, C 517, 45 Stat. 495, provided, in part:

"* * * That the restrictions against alienation, lease mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931 * * *."

The Act of August 11, 1955 (69 Stat. 666), provided for the restrictions; extended by the Act of May 10, 1928, to April 26, 1956; be extended:

"* * * for the lives of the Indians who own such lands subject to such restrictions on the date of this Act."

25 U.S.C. § 462 (Act of June 18, 1934, 48 Stat. 984) provides:

> "The existing period of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

25 U.S.C. § 478-1 (Pub. L. 101-301 § (a), May 24, 1990, 104 Stat. 207) provides, in part:

> "Notwithstanding section 478 of this title, sections 462 [above] and * * * of this title shall apply to:
>
> (3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands."

5. 25 U.S.C. § 405 (Act of March 1, 1907, 34 Stat. 1018) provides, in part:

> "Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest an allotment by inheritance, may sell or convey all or any part of such allotment on such terms and conditions and under such rules and regulations as the Secretary of Interior my prescribe * * *." (Emphasis supplied)

25 C.F.R. § 153.13 provides, in part:

> "When an Indian of the Five Civilized Tribes makes application for removal of restrictions under authority of section 2(a) of the Act of August 11, 1955 (69 Stat. 666) the Secretary will determine the *competency* of the applicant." (Emphasis supplied.)

25 C.F.R. § 153.14 provides, in part:

> "Section 2(b) of the Act of August 11, 1955 (69 Stat 666), authorizes the Secretary to issue an order removing restrictions to an Indian of the Five Civilized Tribes without application therefor. When the Secretary determines an Indian *to be competent* he shall notify the Indian in writing of his intent to issue an order removing restrictions 30 days after the date of the notice." (Emphasis supplied.)

6. Section 6 of Original Creek Treaty provides, in part:

> "Allotments Under Curtis Act Confirmed.—All allotments made to Creek citizens by said commission prior to the ratification of this agreement * * * are confirmed."

7. *Choate v. Trapp,* 224 U.S. 665 (1912) this Court said:

> "There are cases * * * recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. * * *
>
> * * * But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. * * * The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka agreement, but whether they had not acquired rights under the *Curtis Act* which are now protected by the Constitution of the United States." (Emphasis supplied)

The Court then said:

> "There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration,

if, indeed, any was needed, in such a case, to support either the grant or the exemption." (Emphasis supplied)

"* * * The period of exemption was not coincident with this five-year limitation. On the contrary the privilege of nontaxability might last for twenty-one years * * * [longer under § 11 of the Curtis Act]. The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.

* * * The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate * * *. After he accepted the patent the Indian could not be heard * * * to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued.

* * * The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

> * * * In view of the universality of this rule Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws." (Insert and emphasis supplied)

The Court then said:

> "The provision that 'all land shall be nontaxable' naturally indicates that the exemption is attached to the land * * *.
>
> * * *
>
> But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the Indian by prior *laws* or *contracts*. Such rights are protected from repeal by the provisions of the 5th Amendment. (Emphasis supplied)

8. *English v. Richardson*, 224 U.S. 680 (1912), this Court said:

> "The patent [Creek] * * * bore on its face a provision that the land should be nontaxable
>
> * * * as a homestead, which shall be and remain nontaxable, inalienable, and free from any encumbrance whatever for twenty-one years [longer under § 11 of the Curtis Act when the restrictions have been extended] from the date of the deed therefor * * *.
>
> * * * The right of plaintiff to the exemption granted by Congress is protected by the Constitution on principles stated and applied in *Choate v. Trapp.*" (Insert and emphasis supplied)

9. *Woodward v. DeGrafenried*, 238 U.S. 284 (1915) the Court said, on page 287, regarding a Creek Freedwoman and the Curtis Act:

> "Therefore, both the allotment and the death occurred within the period during which § 11 of the Curtis Act * * * was in force in the Creek Nation. * * * For we lay on one side as quite untenable, the contention of defendant that the allotment was made not under the Curtis Act * * *. * * * (the) only lawful authority to allot the Creek lands possessed by the Commission prior to the adoption of the Original Creek Agreement was derived from the Curtis Act * * *. (t)his, of course, is far from saying that the allotment was not made under the Curtis Act."

On page 290:

> "(a) the first 28 sections [including § 11], which contain obligatory provisions applicable (with minor exceptions * * *." (Insert and emphasis supplied)

It continues:

> "With respect to allotments to be made under § 11, no provision is made for extinguishing the tribal title. But there is a proviso (p. 498): 'That the lands allotted shall be nontransferable until after full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held.'"

Beginning on page 292:

> "It is insisted that at least the Curtis act allottee took an inheritable right of occupancy and that this, coupled with confirmation arising from § 6 of the Original Agreement, vested the fee in the heirs of the allottee as of the time of his or her decease, even

though the event occurred before the ratification of the Agreement.

* * * The result [of the Court's investigation] is that the view above expressed respecting the true intent and meaning of § 11 is most fully confirmed." (Emphasis and insert supplied)

Beginning on page 312:

"The sections especially bearing upon the present inquiry are §§ 6, 7 and 8. These and other provisions * * * show that it was the intention of the parties to accept and confirm the allotment work already performed by the Dawes Commission, with the same effect as if it had been done after the ratification of the agreement. * * * We see no evidence of a purpose to put allotments previously made upon a different basis, in any respect, from allotments thereafter to be made * * *. We construe the section to mean that allotments theretofore made, if not inconsistent with the provisions of the Agreement, were to be treated the same as if made after the ratification of the Agreement * * *."

On page 318, we find:

"That which had been tentative and provisional then became, by provisions of the Agreement, final and conclusive. The result was to vest a complete equitable title in her [the allottee's] heirs * * *." (Emphasis and insert supplied)

10. *Carter Oil Co. v. Oklahoma Tax Commission,* 25 P. 2d 1092 (1933) (i.e. after April 26, 1931):

"The land of the allottee, Jimmie Walker, is by treaty provision exempt from taxation so long as he shall own it, and could not be made taxable by present act of Congress. (Citing *Choate v. Trapp,* supra, and

Carpenter v. Shaw, 280 U. S. 363) This exemption is a vested right as these last cited cases hold, but it is the right of the Indian allottee and is vested in him." (Emphasis supplied)

11. *Carpenter v. Shaw*, 280 U.S. 363 (1930), involving a Choctaw, stated:

> "In *Choate v. Trapp* * * * history of the Atoka agreement was reviewed by this court. It was there held that the provision for exemption conferred, upon the allottees, property rights which were within the protection of the 5th Amendment and hence it was not subject to repeal by later congressional legislation. * * *
>
> * * *
>
> * * * We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee."

12. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), the Court said, on page 607:

> "* * * (w)hen Congress wants to require both non-alienability and nontaxability it can, as it has so often done, say so explicitly. [FN 11]"
>
> FN 11: "see, for examples, Act of July 1, 1898, 30 Stat. 567 [§ 11 of Curtis Act] made 'inalienable and nontaxable;' ["while so held"] Act of March 1, 1901, 31 Stat. 861, tract made 'nontaxable and inalienable;' Act of June 30, 1902, 32 Stat. 500, tract to remain 'nontaxable, inalienable, and free from any incumbrance;' Act of April 26, 1906, 34 Stat. 137, 'all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be

exempt from taxation.' * * *" (Emphasis and inserts supplied)

13. *Potter v. United States*, 155 U.S. 438 (1894), regarding the presence of statutory language, this Court reasoned:

"Its presence in the first cannot be regarded as mere surplusage; it means something." (Emphasis supplied)

14. In Merten's, *Law of Federal Income Taxation*, it was stated in §6.101:

"A refund claim for a *noncompetent* Native American may be filed at any time, even after the statute of limitations has expired." (Citing *Dodge v. U. S.* 362 F. 2d 810 (Ct Cl 1966); *Harrington v. U. S.*, 70-1 USTC ¶9215 (ND Okla 1970)) (Emphasis supplied.)

In *Nash v. Wiseman*, 227 F. Supp. 552, (U.S. Dist Ct., W.Dist. Okla., 1963) (questioned by the Supreme Court on another issue but not this issue in *U. S. v. Mason*, 412 U. S. 397, the District Court stated:

"Therefore, we are of the opinion that * * * the law should be to the effect that 'a restricted Indian is a ward of the Government and a refund claim can be filed for such a one at any time.' 10 Mertens, Law of Federal Income Taxation (1958), Sec. 58A.06, note 54, pp. 22-23; 34 Op. Atty. Gen. 302 (1924)." (Emphasis supplied)

In *Daney v. U. S.*, 247 F. Supp. 533 (U.S. Dist. Ct., Dist. Kan, 1965) (affirmed on another issue *U. S. v. Daney*, 370 F. 2d 791, the Court was considering the statute of limitations with respect to a restricted full-blood Choctaw. The Court said:

"It was also stipulated that the tax return was prepared by the Indian Office in Muskogee, Oklahoma, and the tax liability was paid by the Indian Office out of the restrict[ed] funds of the taxpayer.

* * *

Judge Rizley of the Western District of Oklahoma has recently ruled that a refund claim can be filed by a restricted Indian at any time. *Nash v. Wiseman,* 227 F. Supp 552 (W.D. Okla. 1963). See also 10 Mertens, Federal Income Tax § 58A.06 n.54 (1960). In other words, the *noncompetency* of an Indian tolls the applicability of the statute of limitations.

* * * *

We would add that Rev. Rul. 61-11, 1961-1 Cum Bull 724 permits the allowance of a claim for refund notwithstanding the expiration of the statute of limitations for taxes wrongly assessed and collected 'on tax-exempt income directly derived from allotted and restricted [General Allotment] Indian lands.'" (Emphasis and insert supplied)

In *Harrington v. U.S.*, 70-1 USTC ¶9215, (U. S. Dist. Ct., N. Dist. Okla., 1970) the Court concluded:

"3. It was the duty of the Secretary of Interior, acting as guardian of restricted, non-competent Quapaw Indians * * * to determine if income tax returns were due from such restricted, non-competent Indians and to prepare and file such returns, if due, or to see that any return due was filed by the restricted, non-competent Indian himself. * * *

4. It was the duty of the Secretary of Interior to determine if any tax had been overpaid and to file any claims for refund required to be filed by said non-competent Indians.

* * *

8. The income upon which the tax was paid by and for Anna B. Hallam, which is the subject matter of this action, is exempt from the provisions of the income tax law. * * *

9. It is not the policy of the United States to asser the statute of limitations as a defense against a lawfu claim for refund of erroneously collected taxes filec by or for its full-blood, restricted, non-competen Quapaw Indian ward. * * *" (Emphasis supplied)

The case of *Dodge v. U. S.*, 362 F. 2d 810 (U.S. Ct Cl., 1966), involved claims for refund for non-competent Osage Indians for income taxes paid or non-taxable income from excess wage withholding taxes (not from Indian trust funds). The Court, citing *Nash v. Wiseman,* supra, said:

"The Court held 'a restricted Indian is a ward of the Government and a refund claim can be filed for such a one at any time.' This conclusion is equally persuasive in the present case."

The Court stated later:

"* * * If the equitable exception applies to this case, it applies as equally to refund claims by the Indian taxpayers themselves as to claims filed on behalf of the Indians by a government official. * * * Therefore, it is not necessary to determine whether the United States, the Superintendent (as an individual) or the Indians are the real plaintiffs here. * * *

* * *

* * * When plaintiff erroneously collected taxes from these wards on their restricted income he had a duty to seek recovery of them promptly when he discovered his mistake,

regardless of what assets were used to pay the taxes. He is trying to do this now and it is concluded that the statute of limitations does not bar the refund claims he has filed. * * *" (Emphasis supplied)

In *Clark v. U. S.*, 587 F. 2d 465, (CCA-10, 1978), involving a Chickasaw Indian, the Court said:

> "Clark filed what the parties agree is a timely request for refund of taxes paid out of her trust account. 1"

The footnote states:

> "1. While the claim for refund was filed many years after the tax was paid, the IRS concedes that the tax statute of limitations does not apply to tax-exempt income from allotted and restricted lands. Rev. Rul 61-11, 1961-1 C.B. 724. The statute begins to run when the noncompetency status is lifted. [citing *Daney*, supra, and *Dodge*, supra)" (Emphasis supplied)

In *Swietlik v. U. S.*, 779 F. 2d 1306 (CCA-7, 1985), the Court, in a non-Indian tax case, said:

> "The only cases we can find that involve a defense of legal incapacity to the statute of limitations in section 6511(a) involve 'restricted' Indians; and though all hold that the statute of limitations is tolled by the Indians' legal incapacity to file a refund claim. [Citing some of the above cases], they may * * * rest on the special obligations of the United States toward Indians."

34 Op. A. G. 302 states:

> "* * * Moreover, inasmuch as the income-tax statutes do not apply to the class of Indians under discussion, I see no reason why the limitation clauses therein contained relative to claims for refunds or abatements should be invoked against them."

Black's Law Dictionary, Fourth Edition, contains definitions of:

> Non: "Lat. Not. The common prefix of negation."

Competent: "Duly qualified; answering all requirements; having sufficient ability or authority; possessing the requisite natural or legal qualifications able; adequate; suitable; sufficient; capable; legally fit."

and Restricted Lands:

"Lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own supposed incompetency. 25 U.S.C.A § 331 note. *Kenny v. Miles*, * * * 250 U.S. 58 * * *." (Emphasis supplied)

and *United States v. Mitchell (II)* 463 U.S. 206 on page 227:

"It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency." (Emphasis supplied)

In *Alaska v. Native Village of Venetie Tribal Gov't.* 522 U.S. 520 (1998), the Court reasoned that superintendence of the federal government "actively controls the lands in question, effectively acting as a guardian for the Indians." and Superintended land is "under the jurisdiction and control of Congress for all governmental purposes, relating to guardianship and protection of the Indians."

15. Guardianship:

a. Act of May 27, 1908 (35 Stat. 312):

"(Sec. 2) * * * Provided, That leases of restricted lands for oil, gas or other mining purposes, * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of Interior, and not otherwise."

"(Sec. 5) * * * (a)nd also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely void."

"(Sec. 6) * * * The Secretary of Interior is hereby empowered * * * to appoint such local representatives within the State of Oklahoma * * * to inquire into and investigate the conduct of guardians * * * having in charge the estates of minors, and whenever such representative * * * shall be of the opinion that the estate of any minor is not being properly cared for by the guardian * * *, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian * * *, such representative * * * shall have power and it shall be their duty to report said matter in full to the proper probate court and take steps necessary to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees * * *."

"(Sec. 6) And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult and minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, * * * take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or

attempted to be made or executed in violation of this act or any other act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted land.

* * *

Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases, or contracts of any other kind or character whatsoever have been or shall be made contrary to law [Constitution] with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of Interior, without cost or charges to the allottees, the necessary expenses in so doing to be defrayed from the money appropriated by this act."

"(Sec. 11) That all royalties arising on and after July first, nineteen hundred and eight from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; * * *."

b. Act of March 1, 1907 (34 Stat. 1015, 1018, 25 U.S.C. 405):

"Any noncompetent Indian to whom a patent containing restrictions against alienation has been issue for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or

any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; * * *.

c. The Act of August 1, 1914, 38 Stat. 601, as amended by the Act of June 25, 1948, 62 Stat. 859 (25 U.S.C. § 86) now provides:

"Land allotted to any applicant for enrollment as a citizen of the Five Civilized Tribes whether an Indian or freedman, shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under the laws of the United States: * * *."

d. The Act of June 14, 1918, 40 Stat. 606 (25 U.S.C. § 355) § 2:

"Any land allotted in such proceedings [Oklahoma partition proceedings] to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition." (Insert supplied)

e. Act of August 11, 1955 (69 Stat. 666), § 5:

"Any existing exemption from taxation that constitutes a vested property right shall continue in force and effect until it terminates by virtue of its own limitations."

f. 25 U.S.C. § 372:

"When any Indian to whom an allotment of land has been made * * dies before the expiration of the trust

period and before the issuance of a fee simple patent without having made a will disposing of said allotment * * *, the Secretary of the Interior * * * shall ascertain the legal heirs of such decedent * * *. If the Secretary of the Interior * * * shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold. * * * Provided, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests shall appear. * * * ." Also applicable to restricted allotments: *United States v. Bowling,* 256 U.S. 484 (1921)

g. 25 U.S.C. § 396c:

"On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of Interior, guaranteeing compliance with the terms of their leases. * * * ."

h. 25 U.S.C. 396d:

"All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 3 96a to 3 96g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of said Secretary, any lease for oil or gas * * * shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by the Secretary * * * which involves the development or production of oil or gas from land covered by such lease."

i. 25 U.S.C. § 282:

"The Secretary of the Interior is authorized to make and enforce such rules and regulations as may be necessary to secure the enrollment and regular attendance of eligible Indian children who are wards of the Government in schools maintained for their benefit by the United States or in public schools." (Emphasis supplied)

j. 25 U.S.C. § 283:

"The Secretary of the Interior may in his discretion, establish such regulations as will prevent the issuing of rations or the furnishing of subsistence either in money or in kind to the head of any Indian family for or on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations. * * *"

k. 25 U.S.C. § 2:

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matter arising out of Indian relations."

l. 18 U.S.C. § 1154:

"(a) Whoever sells * * * intoxicating liquor of any kind whatsoever * * * to any Indian * * * who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government through its departments, exercises guardianship, * * * shall for the first offense be fined under this title or imprisoned * * *."

16. Trust Relationship:

a. 25 U.S.C. § 161a:

"(b) All funds held in trust by the United States * * * to the credit of individual Indians shall be invested by the Secretary of Treasury * * *."

b. 25 U.S.C. § 162a:

"(a) * * * The said Secretary [of Interior] is also authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians: * * *

* * *

(d) Trust responsibilities of Secretary of Interior:

The Secretary's proper discharge of the trust responsibilities include (but are not limited to the following:

* * *

Providing adequate staffing, supervision, and training for trust fund management and accounting.

Appropriately managing the natural resources located within the boundaries of Indian reservation and trust lands." (Emphasis supplied)

c. 25 U.S.C. § 4001:

"For the purposes of this chapter:

(1) The term 'Special Trustee' means the Special Trustee for American Indians appointed under section 4042 of this title.

(2) The term 'Indian tribe' means any Indian tribe which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

* * *."

d. 25 U.S.C. § 4041:

"The purposes of this subchapter are—

(1) to provide for more efficient management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to * * * individual Indians by establishing in the Department of Interior an Office of Special Trustee for American Indians to oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities;

(2) to ensure that reform of such practices in the Department is carried out in unified manner and that reforms of policies, practices, procedures and systems in the Bureau, Minerals Management Service, and Bureau of Land Management which carry out such trust responsibilities, are effective, consistent and integrated; and

(3) to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to * * * individual Indians."

e. 25 U.S.C. § 4042:

"(b)(1) The Special Trustee shall be appointed by the President * * * from among individuals who possess demonstrated ability in general management * * * and particular knowledge of trust fund management * * *." (Emphasis supplied)

f. 25 U.S.C. § 4043:

"(a)(1) The Special Trustee shall prepare * * * that will ensure proper and efficient discharge of the Secretary's trust responsibilities to * * * individual Indians * * *.

(2) The plan prepared under paragraph (1) shall include the following:

(A) Identification of all reforms to * * * systems of the Department of the Bureau, the Bureau of Land Management, and the Minerals Management Service necessary to insure the proper and efficient discharge of the Secretary's trust responsibilities

* * *.

(b)(1) The Special Trustee shall oversee all reform efforts within the Bureau, the Bureau of Land Management, and the Minerals Management Services relating to the trust responsibilities of the Secretary * * * to allow the Secretary to discharge his trust responsibilities * * * .

* * *

(2)(C) The Special trustee shall insure that the Bureau establishes policies and practices to maintain complete, accurate, and timely data regarding the ownership and lease of Indian lands.

(3) The Special Trustee shall ensure that the Bureau of Land Management establishes policies and practices adequate to enforce compliance with Federal requirements for drilling, production, accountability, environmental protection, and safety with respect to the lease of Indian lands.

(4) The Special Trustee shall ensure that the Minerals Management Services establishes policies and procedures to enforce compliance by lessees of Indian lands with all requirements for timely and accurate reporting of production and payment of legal royalties and other revenues, including the audit of leases to ensure that lessees are accurately reporting production levels and calculating royalty payments.

(c)(4) The Special Trustee shall ensure that—

(A) the land records system of the Bureau interfaces with the trust fund accounting system, and

(B) the asset management systems of the Minerals Management Service and the Bureau of Land Management interface with the appropriate asset management and accounting systems of the Bureau, ensuring that—

(i) the Minerals Management Service establishes policies and procedures that will allow it to properly collect, account for, and disburse to the Bureau all royalties and other revenues generated by production from leases on Indian lands; and

(ii) the Bureau of Land Management and the Bureau provide Indian landowners with accurate and timely reports on a periodic basis that cover all transactions related to leases of Indian resources."

In *United State v. Mitchell (II)*, 463 U.S. 206, 77 L.Ed. 580, 103 S. Ct. 2961 (1983) the Court, based on statutes no more controlling than in the instant case, said, on page 207:

"The principal question in this case is whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation."

On page 210, the Court said:

"The respondents are 1,465 individuals owning interests in allotments on the Quinault Reservation, an unincorporated association of Quinault Reserva-

tion allottees, and the Quinault Tribe, which now holds some portions of the allotted lands."

On page 220, the Court said:

"From the outset, the Interior Department recognized its obligation to supervise the cutting of Indian timber [supervise leasing of oil and gas properties and accounting for same]. * * *

Over time, deficiencies in the Interior Department's performance of its responsibilities became apparent [taxing of exempt income]" (Inserts and emphasis supplied)

On page 222, the Court said:

"Referring to the relationship between the Indians [Quinault] and the Government as a 'sacred trust,' Representative Howard stated that '[t]he failure of the governmental guardian to conserve the Indians' land [oil and gas royalties on Indians' land] and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the average Indian.'" (Inserts and emphasis supplied)

On page 225, the Court said:

"Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property [oil and gas leases and property] belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds [Indian oil and gas mineral interests]). {Footnote 30. See Restatement (Second) of Trusts § 2, Comment h. p 10 (1959)} '[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary

relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' * * *

* * * This Court has previously emphasized 'the distinctive obligations of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' * * *" (Emphasis and inserts supplied)

On page 226, the Court said:

"Because of the statutes and regulations [above statutes, and the treaties, Constitution and Bureau of Indian Affairs acknowledgment of Trust responsibility] at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources [Indian lands and oil and gas resources], they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained [refund of Federal income taxes on oil and gas income]. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties [liable to refund income taxes collected on the exempt income]. It is well established that a trustee is accountable in damages for its breaches of trust. See Restatement (Second) of Trusts §§ 205-2 12 (1959); G. Bogert Law of Trusts and Trustees § 862 (2d ed 1965); 3 A. Scott, Law of Trusts § 205 (3d ed 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian Tribe includes a fundamental incident of

the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust [income tax refund collected by the trustee from the cestui que trust." (Inserts and emphasis supplied)

Beginning on page 227, the Court said:

"* * * For example, if timber on an allotment has been destroyed through Government mismanagement {depletion of the mineral reserves and taxing of the income therefrom}, it will take many years for nature to restore the timber {can never replace the mineral reserves}. As this Court has observed: 'Once logged off, the land is of little value {depletion of value from oil and gas produced and taxed}. The land no longer serves the purpose for which it was by treaty set aside to [the allottee's] ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence.' *Squire v. Capoeman* * * * {a Supreme Court tax case determining the sale of timber non-taxable}

We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation {refund of income tax collected} by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property. The Court of Claims {District Court for the Northern District of Oklahoma} therefore has jurisdiction over respondents' claims for alleged breaches of trusts [income tax refunds]." (Inserts {} and emphasis supplied)

In *United States v. Mason*, 412 U.S. 391 (1973) the Court said, regarding an Osage Indian, on page 398:

"There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and

that, as such, it is duty bound to exercise great care in administering its trust." (Emphasis supplied)

In Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana, 792 F. 2d 782 (CCA-9, 1986) the Court said, on page 794:

"The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396g, is a detailed and comprehensive act that imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of the Indians. * * * Taking into account these specific, congressionally-imposed duties, and the long-standing, general trust relationship between the government and the Indians, we conclude that a fiduciary relationship exits in the management of tribal mineral resources. * * (statutes and regulations contain such explicit duties that it is clear Congress intended Secretary to act as trustee in managing leases for the Indians) * * (statutes establish fiduciary duty in the management of Indian timber resources).

The United States, as the Tribes fiduciary, is held to strict standards and is required to exercise the greatest care in administering its trust obligations. * * *

Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries. * * * (trustee may not delegate duties for which he is responsible); Restatement (Second) of Trusts * * *" (Emphasis supplied)

On page 795, the Court said:

> "(statutes are to be construed liberally in Indians' favor, with ambiguities interpreted to their benefit).' (Emphasis supplied)

In *Jicarilla Apache Tribe v. Supron Energy Corporation, et al*, 782 F. 2d 855 (CCA-10, 1986) the Court said, on page 857:

> "These cases are before the court for rehearing en banc. The majority of the court adopts the prior dissenting opinion of Judge Seymore, reported at 718 F. 2d 1555, 1563 (10th Cir. 1984) with the exceptions and additions set out below." (Emphasis supplied)

The said dissent, on page 1563, stated:

> "* * * The Supreme Court has continually recognized 'the distinctive obligation of trust incumbent upon the Government,' * * * in its dealings with the Indian tribes. * * * Because of this trust relationship the Government, in both its executive and legislative branches, is held to a high standard of conduct, one consonant with its 'moral obligations of the highest obligation and trust.' * * * For the same reason, whenever doubt or ambiguity exists in federal statues or regulations, such doubt is resolved in favor of the tribes. * * *" (Emphasis supplied)

The said dissent then states, beginning on page 1563:

> "In addition to the all-pervasive 'general trust relationship between the United States and the Indian people . . . [that] has long dominated the Government's dealings with Indians,' * * * the Supreme Court has declared that other, context-specific trust relationships of varying depth and responsibility exist. * * * (other federal statutes and regulations establish a full fiduciary relationship in management of allotted forest lands.)

> Both the Supreme Court and this circuit have recently set out the test for determining a trust relationship. In * * * we made it clear that no particular words or phrases are critical to the finding of a trust relationship. * * * Rather, the test is whether 'the relevant statutory and regulatory provisions [contain] an enumeration of duties which would justify a trustee.' Id/ In *Mitchell II,* the Court reviewed the statutes and regulations * * * to determine whether they 'give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." (Emphasis supplied)

On page 1564, the dissent quoted from *Mitchell II*:

> All of the necessary elements of a common-law trust are present. * * *" (Emphasis supplied)

In discussing the legislative history of 25 U.S.C. §§ 396a-396g, the dissent said, on page 1565:

> * * * When the Act was proposed, the Secretary of Interior urged that the legislation be enacted because 'it is not believed that the present law is adequate to give the Indians the greatest return from their property.' Senate Report No. 985 at 2 (1937); House Report No. 1872 at 2 (1938)."

The dissent then said, on page 1565:

> * * * (I)n my view *Mitchell II* compels the conclusion that Congress intended the Secretary to be a trustee." (Emphasis supplied)

17. In 2000 (after *United States v. Brockamp*, 519 U.S. 347 (1997) Service Center Advice (SCA 200108039, the Government considered 26 U.S.C. § 6511 in connection with lands held by the United States as Trustee for Indians [example General Allotment Indians]. It concluded:

"1. The period of limitations established by section 6511 is tolled until such Indian ward has the restrictions removed from his or her Indian trust lands.

2. Only the removal of restrictions from the entire amount of an Indian ward's land will commence the statute of limitations in section 6511.

3. The period of limitations established by 6511 does not commence upon the death of an Indian ward."

It stated: "The Indian Wards, or their heirs, have filed claims for refund with the Internal Revenue Service regarding these erroneous payments of tax for exempt income. These claims for refund are made decades after the underlying return was filed and the tax was erroneously paid."

It quoted (*Choate v. Trapp,* supra, Five Tribes Indians) "'The construction, instead of being strict, is liberal * * *'." (Emphasis supplied) Then also cited *Daney v. United States,* supra, Five Tribes Indian.

It quoted 34 Op. Att'y Gen. 302 (1924), by Attorney General, later Justice, Harlan F. Stone, supra:

"'The governmentally appointed agent—I refer to the superintendent—having paid this money over, [collected taxes under an unconstitutional law] failed to discover the irregularity of his action within the five-year period provided by the income tax statutes as the limitation period for making claims for recovery. The Indian is not to blame for this, and, if

the Government could take advantage of the mistake [intentional collection of unlawful taxes, still being maintained and argued in this case] of its own agent in this regard, it could go just one step further and in the interest of its revenue instruct the superintendent to allow such claims to lapse.'" (Inserts supplied)

It further cites *Nash v. Wiseman*, supra: "(restricted Indian is a ward of the Government and a refund claim can be filed at any time)"; *Dodge v. United States,* supra: "(accepting rule of Nash court, noting that Richards involved the claim of an unrestricted Indian)" and *Daney v. United States*, supra, a Five Tribes Indian "(the running of the three-year period for the filing of refund claims did not commence until after taxpayer's noncompetence restrictions were removed)".

18. In *United States v. Bowling*, 256 U.S. 484, (1921), this Court said:

"* * * modes * * * One is to issue to the allottee a written instrument or certificate, called a trust patent, declaring that the United States will hold the land for a designated period, usually twenty-five years, in trust for the sole use and benefit of the allottee, or, in the case of his death, of his heirs, and at the expiration of that period will convey the same to him, or his heirs, in fee, discharged of the trust and free of all charge or encumbrance. The other is to issue at once to the allottee a patent conveying to him the land in fee, and imposing a restriction upon its alienation for twenty-five years or some other stated period. While alienation is effectually restricted by either mode, allotments under the first are commonly spoken of as trust allotments, and those under the second as restricted allotments. As respects both classes of allotments—one as much as the

other—United States possesses a supervisory contro over the land."

In *Federal Indian Land Law*, United States Department of the Interior, United States Government Printing Office (1958) the Author states, beginning on page 876:

"In *West v. Oklahoma Tax Commission* [334 U.S. 717 (1948)] the Court followed *Oklahoma Tax Commission v. United States* in holding that for the purpose of the estate tax, there is no substantial difference between restricted and trust property. Said Mr. Justice Murphy for the majority:

* * *

We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same. *Board of Commissioners v. Seber*, 318 U. S. 705, 717; *United States v. Ramsey*, 271 U. S. 467, 471. Both devices have the common purpose of protecting those who have been found by Congress to be unable to assume a fully independent status relative to property. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax. The fact that the United States holds legal title as to trust property but not as to restricted property affords no distinguishing characteristic from the standpoint of an estate tax. In addition, Congress has given no indication whatever that trust properties in general are to be given any greater tax exemption than restricted properties. * * *"

19. In 54 C.J.S. *Limitations of Actions* § 21 the Author states:

> "In the case of a technical trust, that is, a trust which is direct, express, and continuing, it is the general rule, sometimes declared by statute, that the statute of limitations does not run between the trustee and the cestui que trust as long as the trust subsists.
>
> * * * (A)s long as this condition exists, no cause of action has accrued.
>
> When and whether the statute of limitations begins to run in cases relating to trusts depends on the nature of the trust, the relationship of the parties, whether the trust has been terminated or repudiated, and other circumstances * * *."

In *United States v. Taylor*, 104 U.S. 216 (1881), this Court said, beginning on page 221:

> "A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the government to say to the owner that the surplus proceeds should be held in the treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor has not been made within six years.
>
> The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the cestui que trust in such manner that he is called upon to assert his rights, the Statute of Limitations will begin to run against him from the time such knowledge is brought home to him, and not before. * * *

> In analogy to this rule the right of the owner of the land to recover the money which the government held for him as his trustee did not become a claim or which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the treasury. Upon such demand the claim first accrued." (Emphasis and insert supplied)

In *Harrison v. Eaves*, 130 P. 2d 841 (Okl., 1942) the Court held, in syllabus # 4 by the Court:

> "Until there has been a repudiation of a trust by the trustee thereof [Defendant still claims trust relationship here] no statute of limitations begins to run on an action to enforce it nor does there exist any latches." (Insert supplied)

In *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (USDC N. D. California, 1973), on page 1249:

> "* * * (W)here, as here, there is a fiduciary relationship [see Footnote 2 *Mitchell II*, infra] between the parties, the universal rule is that 'a statute of limitation does not begin to run where there is a fiduciary relationship between the parties until the relationship is repudiated.' (Citing CCA-9, CCA-10 and other authority) * * * ('the statute of limitations never runs in favor of a trustee as against a beneficiary while the later is in possession of the property') (citing authority) * * * Thus, the statute does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship terminated [here the United States still claims to be Trustee with Trust duties to the Indians].
>
> This general rule has been applied in cases involving Indian beneficiaries suing the Government for tax

refunds arising out of mismanagement of trust funds. *Dodge v. United States*, 362 F. 2d 810, 176 Ct. Cl. 476 (1866); *Daney v. United States*, 247 F. Supp. 533 (D. Kan. 1965), *affirmed*, 370 F. 2d 791 (10 Cir. 9166); *Nash v. Wiseman*, 227 F. Supp. 552 (W.D. Okla. 1963) While neither the parties nor the Court have been able to find a case directly only point, there appears to be no reason for a different rule where the trustee failed to credit trust with trust income, as here, than in the case where the trustee improperly paid out trust income [allowed proceeds from restricted lands {trust} to be paid out to Trustee, {Defendant United States}] as in the *Nash, Daney* and *Dodge* cases. As stated in the *Dodge* case, the reason for such a rule 'concentrates on the necessity of dealing fairly [see *Seminole Nation v. United States*, supra,: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."] with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty.''362 F. 2d 810, at 813." (Inserts and emphasis supplied)

In *Hopeland Band of Pomo Indians v. United States*, 855 F. 2d 1573 (Fed. Cir., 1988), the Court said on page 1978:

"The general rule is that the statute of limitations 'does not run against a beneficiary in favor of a trustee until the trust is repudiated [here the United States, through the BIA, still claims to be acting as trustee with respect to the Five Civilized Tribes]' * * *" (Insert supplied)

20. This Court in *Seminole Nation v. United States*, 31€ U.S. 286 (1942), stated:

> "Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in dealing with these dependent and sometimes exploited people. * * * In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under the humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. * * *" (Emphasis supplied)

This Court there placed a footnote which quoted Chief Judge (later Mr. Justice) Cardozo:

> "'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unending and inveterate. Uncompromising rigidity has been the attitude of court of equity when petitioned to undermine the rule o£ undivided loyalty the 'disintegrating erosion' of particular exceptions. . . .Only thus has the level o£ conduct for fiduciaries been kept at a level higher than that trodden by the crowd. . .'" (Emphasis supplied)

In *Squire v. Capoeman*, 351 U.S. 1 (1956), this Court quoted with approval from an attorney general's advice:

> "'(U)nable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.'" (Emphasis supplied)

This Court, at the conclusion of the opinion, said:

> "To tax respondent under these circumstances would, in the words of the court below, be 'at least, a sorry breach of faith with these Indians.'" (Emphasis supplied)

21. The Atoka Agreement, 30 Stat. 495 (Original Choctaw-Chickasaw Allotment Agreement) provided:

> "All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of the patent, and each shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have separate patent, and which shall be inalienable for twenty-one years from date of patent."

The Atoka Agreement was incorporated in § 29 of the *Curtis Act* as follows:

> "That the agreement made by the Commission to the Five Civilized Tribes with commissions representing

the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven [Atoka Agreement], as herein amended, is hereby ratified and confirmed * * *." (Insert and emphasis supplied)

22. Section 23, of the Original Creek Treaty provides, in part:

> "Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment." (Emphasis supplied)

23. In *Gleason v. Wood*, 224 U.S. 679, (1912), the Court said:

> "The complaint alleges that the plaintiffs are Choctaws owning homesteads and surplus granted under the terms of the Atoka agreement. * * * All the questions involved are disposed of by the decision in *Choate v. Trapp*."

24. In *Board of County Commissioners of Tulsa County, Okla. v. United States*, 94 F. 2d 450 (1938), this Court said:

> "The relations between the Five Civilized Tribes and the United States in the division of the tribal lands between the members of tribes in severalty was contractual. * * * It was therefore held that the acceptance of deed containing exemption of the land from taxation under the allotment acts operated as full performance by the allottees of the contract and created a vested right in the Indian of the exemption which is protected by the Fifth Amendment." (Emphasis supplied)

25. In *The Lands of the Five Civilized Tribes*, by Lawrence Mills, F. H. Thomas Law Book Company (1919), the author stated:

> "* * * In the construction of the two Acts it has been held that the period of exemption from taxation is coextensive with the period of restriction upon alienation. The proposition is thus stated in *United States v. Shock*, infra [187 Fed. (CC) 862]: 'From this it is clear that regardless of prior legislation or treaties, the intention and policy of Congress as expressed by the two Acts last referred to, was that so long as these allotted lands remain subject to any restriction upon alienation they shall not be taxed by the State, * * *.'" (Emphasis supplied)

26. In H. Rep. No. 2415, 71st Cong. 3d Sess., p. 1 advocating passage of what is now the Act of February 14, 1931, stated:

> "Under existing law the restricted allotted lands of Indians of the Five Civilized Tribes are tax exempt while restricted." (Emphasis supplied)

27. In Black's Law Dictionary, Fourth Edition, one definition of:

> (1) "incumbrance" is: "A claim, lien, charge or liability attached to and binding real property"; one definition of (2) "incumber" is "To incumber land is to make it subject to a charge or liability * * *" [tax on royalty is tax on land—*Carpenter v. Shaw*, (Appendix 11)]; and (3) one definition of "charge" is: "An incumbrance, lien, or claim, a burden or load; an obligation or duty; a liability; an accusation." (Emphasis supplied)
>
> As late as *Chickasaw and Choctaw Nations v. U. S.*, 88 AFTR 2d ¶ 2001-5575 (Sup. Ct., 2001) this Court said, regarding the Indian and tax canons, concerning *Capoeman:*

"(Indian canon offsetting tax canon when related statutory provisions and history make clear that language freeing Indian land' 'of all charge or incumbrance whatsoever'' includes tax) * * *."

In *Joseph T. Kiefer et ux v. Comm.*, T.C. Memo. 1998-202, involving a Spokane Indian, the Court said:

"The court in *Anderson* found that the rationale of the *Squire v. Capoeman*, supra, case was:

'if an Indian's allotted land (or the income directly derived from it) was taxed, and the tax was not paid, the resulting tax lien on the land would make it impossible for him to receive the land free of 'incumbrance' at the end of the trust period. [when the restrictions are removed] * * *" (Emphasis and insert supplied)

26 U.S.C. § 6321 provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." (Emphasis supplied)

Treas. Reg. § 301.6321-1, after reciting the provisions of the statute states that:

"any interest held in restricted land held in trust by the United States for an individual incompetent Indian (and not for a tribe) shall not be deemed to be property, or a right to property, belonging to such Indian." (Emphasis supplied)

Restricted Five Civilized Tribes Indians are not exempted from the lien statute, according to the treasury regulation.